No. 07-247

In the Supreme Court of the United States

STEPHEN M. TREZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JEFFREY P. SINGDAHLSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal of the denial of his pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Andersen v. *United States*, 298 F.3d 804 (9th Cir. 2002), cert. denied, 538 U.S. 977 (2003) 4, 5, 11

Church of Scientology v. *United States*, 591 F.2d 533 (9th Cir. 1979) 9, 10, 11

Cobbledick v. *United States*, 309 U.S. 323 (1940) 9

DiBella v. *United States*, 369 U.S. 121 (1962) ... 5, 6, 7, 8, 9

First Nat'l Bank v. *United States Dep't of Justice*, 865 F.2d 717 (10th Cir. 1989) 10

Franks v. *Delaware*, 438 U.S. 154 (1978) 2, 3

Grand Jury Proceedings (Berry), In re, 730 F.2d 716 (11th Cir. 1984) 10

Grand Jury Proceedings (Young), In re, 716 F.2d 493 (8th Cir. 1983) 10

Imperial Distrib. Inc. v. *United States*, 617 F.2d 892 (1st Cir.), cert. denied, 449 U.S. 891 (1980) 8, 10

949 Erie St., Racine, Wisc., In re, 824 F.2d 538 (7th Cir. 1987) 8, 10, 11

Sealed Appellant 1 v. *Sealed Appellee*, 199 F.3d 276 (5th Cir. 2000) 7, 8, 10, 11

Standard Drywall, Inc. v. *United States*, 668 F.2d 156 (2d Cir.), cert. denied, 456 U.S. 927 (1982) 7, 10, 11

Cases—Continued Page

United States v. *Calandra*, 414 U.S. 338 (1974) 9
United States v. *Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006) 5, 12
United States v. *Dionisio*, 410 U.S. 1 (1973) 9
United States v. *Furina*, 707 F.2d 82 (3d Cir. 1988) .. 10, 11
United States v. *In re Search of Law Office, Residence, & Storage Unit Alan Brown*, 341 F.3d 404 (5th Cir. 2003) 2
United States v. *Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) 10
United States v. *Regional Consulting Serv. for Econ. & Cnty. Dev., Inc.*, 766 F.2d 870 (4th Cir. 1985) 9, 10
Warrant Dated Dec. 14, 1990 (Shapiro), In re, 961 F.2d 1241 (6th Cir. 1992) 10, 11
Wisniewski v. *United States*, 353 U.S. 901 (1957) 12

Statutes and rule:

18 U.S.C. 3731 (2000 & Supp. V 2005) 12
28 U.S.C. 1291 ..... 5, 6
Fed. R. Crim. P. 41(g) 2, 5

In the Supreme Court of the United States

No. 07-247

STEPHEN M. TREZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the appeal for lack of jurisdiction (Pet. App. 1a) is unreported. The order of the district court denying petitioner's motion for return of property (Pet. App. 2a-11a) and the report and recommendation of the magistrate judge (Pet. App. 12a-21a) are also unreported.

JURISDICTION

The order of the court of appeals was entered on April 6, 2007. A motion for reconsideration was denied on May 23, 2007 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on August 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the District of Arizona denied petitioner's pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g). Petitioner appealed, and the court of appeals dismissed the appeal for lack of appellate jurisdiction. Pet. App. 1a.

1. On November 2, 2005, a magistrate judge issued search warrants for petitioner's law office and for storage units used by his law office. The search warrants authorized the seizure of documents relevant to possible criminal tax violations. At the time of the searches and the filing of petitioner's motion for return of property, a federal grand jury was investigating petitioner for possible criminal violations. Pet. App. 1a, 2a, 12a, 23a.

The warrants were executed by a "taint team" in light of the possible presence of privileged materials.[1] Pursuant to procedures set out in the affidavit supporting the warrants, no documents were to be provided to the investigative team until a privilege review had been conducted. The taint team conducted that review and returned any privileged documents to petitioner. The taint team also provided petitioner with copies of all documents the government had seized in the search. Pet. App. 2a, 12a-13a, 14a.

2. On June 16, 2006, petitioner filed a motion for a hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978), and a motion for the return of property under Fed. R.

---

[1] A taint team consists of lawyers and agents who are not involved in the underlying investigation and whose review of arguably privileged material is intended to prevent that material from reaching the prosecutors and investigators conducting the investigation. See *United States* v. *In re Search of Law Office, Residence, & Storage Unit Alan Brown*, 341 F.3d 404, 407 (5th Cir. 2003).

Crim. P. 41(g).[2] The court *sua sponte* dismissed the motion for the *Franks* hearing as premature and set a hearing date for the Rule 41(g) motion. Pet. App. 3a, 13a.

In connection with the Rule 41(g) motion, petitioner served the investigative agent and several other witnesses with subpoenas duces tecum, seeking to depose and to obtain documents from the witnesses. Petitioner also moved to disqualify Assistant United States Attorneys on the investigative and taint teams on the ground that they would have to be witnesses at an evidentiary hearing on the Rule 41(g) motion. Pet. App. 13a-14a.

The government agreed that the documents seized pursuant to the search warrants would not be turned over to the investigative team until the district court ruled on the motion. The government explained, however, that this would impede the investigation. The government noted in this regard that the statute of limitations would run on one of the tax years under investigation on April 15, 2007. Pet. App. 7a-8a & n.2, 12a-13a & n.1, 14a.

3. a. Petitioner's Motion for Return of Property was referred to a magistrate judge, who recommended that it be denied. See Pet. App. 12a-21a. The magistrate judge concluded that the relief petitioner sought—to have all originals and copies returned to him to ensure the government would not be able to use them—had no justification under the facts and circumstances of the

---

[2] *Franks* permits a defendant in a criminal case to obtain an evidentiary hearing based on a "substantial preliminary showing" that a search warrant affidavit contained a "false statement [made] knowingly and intentionally, or with reckless disregard for the truth," if the "false statement is necessary to the finding of probable cause." 438 U.S. at 155-156.

case. See *id.* at 20a. In particular, he explained that petitioner "has not complained that he needs original documents, as opposed to the copies he was given," and, in fact, "it appears [petitioner] has sold his interest in the law firm." *Ibid.* Accordingly, the magistrate judge concluded, the relief that petitioner sought was to have the documents "suppressed as evidence in any future prosecution against him" and "[t]hat is not an appropriate remedy under Rule 41(g)." *Ibid.*; see also *id.* at 14a (relief sought "is tantamount to a pre-indictment motion to suppress").[3]

b. Following *de novo* consideration of the motion, the district court accepted and adopted the magistrate judge's recommendation. Pet. App. 2a-11a. The court concluded that none of the four factors considered in the Ninth Circuit to decide whether to exercise equitable jurisdiction to grant a motion for return of property favored petitioner. *Id.* at 6a-8a. Consistent with the conclusions of the magistrate judge, the district court found, among other things, that petitioner had "not express[ed] a need for access to any of the seized documents" and had made "no argument of irreparable harm related to not possessing the original documents." *Id.* at 7a. The district court also reiterated the magistrate judge's conclusion that petitioner's motion was effectively a pre-indictment motion to suppress and an attempt to obtain extraordinary, civil discovery in connection with a criminal investigation. *Id.* at 8a-9a.

4. Petitioner appealed, and the government moved to dismiss for lack of appellate jurisdiction. Relying on its holding in *Andersen* v. *United States*, 298 F.3d 804

[3] The magistrate judge noted as well that petitioner was attempting to use the Rule 41(g) motion as a vehicle to obtain extraordinary, civil discovery of the government's investigation. Pet. App. 14a.

(9th Cir. 2002), cert. denied, 538 U.S. 977 (2003), that "rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation," *id.* at 808, the court of appeals granted the motion to dismiss. Pet. App. 1a.

The court subsequently denied petitioner's request for reconsideration and reconsideration en banc. The court reiterated that *Andersen*, *supra*, governed this case and rejected petitioner's new argument that dismissal was inconsistent with the court's decision in *United States* v. *Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006). Pet. App. 22a-23a.

ARGUMENT

Petitioner contends (Pet. 4-11) that the court of appeals erred in failing to treat the denial of his motion for return of property under Fed. R. Crim. P. 41(g) as a final order, and therefore immediately appealable under 28 U.S.C. 1291. The court of appeals correctly held that under this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962), it lacked appellate jurisdiction over the denial of petitioner's Rule 41(g) motion. Although there is a conflict among the courts of appeals as to whether a pending grand jury investigation qualifies as a "criminal prosecution *in esse*" for purposes of *DiBella*, the Court has declined to resolve that conflict on numerous occasions over the past three decades, and there is no reason for a different result here, where petitioner's motion falls within *DiBella*'s rule for the independent reason that it is an attempt to obtain the suppression of evidence by other means. Further review is therefore not warranted.

1. a. In *DiBella*, *supra*, the Court addressed whether, and under what circumstances, the denial of a pre-

BEST AVAILABLE COPY

indictment motion for return of property is immediately reviewable under 28 U.S.C. 1291. In doing so, the Court emphasized the significant harms and risks of delay and abuse that immediate appeal of such motions would cause. See, *e.g.*, *DiBella*, 369 U.S. at 126 ("the delays and disruption attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law"); *id.* at 129 ("fortuity of a pre-indictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availability of other essential evidence"). Moreover, the Court explained, a pre-indictment motion for return of property, no less than a motion filed after indictment, "presents an issue that is involved in and will be part of a criminal prosecution in process." *Id.* at 127; see also *ibid.* (disposition of motion "will necessarily determine the conduct of the trial and may vitally affect the result") (citation omitted); *id.* at 129 ("appellate intervention makes for truncated presentation of the issue of admissibility").

In light of these considerations, the Court held that the fact that a motion for a return of property is filed before indictment is not sufficient to make a court's "evidentiary ruling" on that motion an "independent proceeding" that results in a final judgment immediately subject to appeal. *DiBella*, 369 U.S. at 131. Instead, "[o]nly if the motion is solely for return of the property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *Id.* at 131-132.

b. In this case, petitioner failed to meet either of the two *DiBella* prerequisites for treating the motion as a truly independent proceeding, and thus subject to imme-

diate appeal as a final order under Section 1291.[4] Petitioner's motion was not "solely for return of property." Rather than a "collateral attempt to retrieve property," petitioner's motion was instead plainly "an effort to suppress evidence in related criminal proceedings." *Sealed Appellant 1* v. *Sealed Appellee*, 199 F.3d 276, 278 (5th Cir. 2000) (internal quotation marks omitted). As the court below recognized, petitioner's motion was not directed to obtaining access to the seized documents; the government provided him with originals of the privileged documents and copies of everything else, and he did not contend this was inadequate to his needs. See, *e.g.*, Pet. App. 7a (Petitioner "does not express a need for access to any of the seized documents."); *id.* at 20a (Petitioner "has not complained that he needs original

[4] There is no merit to petitioner's contention (Pet. 5-7) that this case is not covered by *DiBella* because it was formally treated as a civil case with a different docket number. Although it is common to decide pre-indictment motions for return of property under separate, civil docket numbers, no court has apparently treated that fact as determinative. See, *e.g.*, *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 157 n.3 (2d Cir.), cert. denied, 456 U.S. 927 (1982). To the contrary, doing so would conflict with *DiBella*. One of the two cases decided in *DiBella* involved a motion brought in a different district (and circuit) than the district in which the indictment was returned. It thus necessarily had a separate docket number. See *DiBella*, 369 U.S. at 123. This Court, however, rejected the contention that it should "assign independence to the suppression order because [it was] rendered in a different district from that of trial." *Id.* at 132. Such a result would place form over substance and ignore "practicalities in the administration of criminal justice" and the "practical reason for denying [the Rule 41 motion] recognition" as an "independent proceeding[]." *Id.* at 129. Accordingly, the Court concluded that, although the motion was formally decided in a separate proceeding, "it accords most satisfactorily with sound administration of the Rules to treat such ruling as interlocutory." *Id.* at 133.

documents, as opposed to the copies he was given. In fact, it appears [he] has sold his interest in the law firm."). The motion instead sought to suppress the evidence seized in the search so that it could not be used against him in criminal proceedings. See, *e.g.*, *id.* at 20a ("The relief [petitioner] seeks is for the documents seized to be suppressed as evidence in any future prosecution against him."); C.A. E.R. 197 (acknowledging that "the relief [petitioner] seeks is an order from the Court requiring the Government to return all originals and copies of the documents seized and an order preventing the government from presenting any of the illegally seized material to the grand jury and precluding the government from obtaining an indictment of [petitioner]"). As the courts of appeals have consistently held, a request for relief of that character does not satisfy the *DiBella* requirement that the motion be "solely for the return of property." See, *e.g.*, *Sealed Appellant 1*, 199 F.3d at 278; *In re 949 Erie St., Racine, Wisc.*, 824 F.2d 538, 541 (7th Cir. 1987); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 895-896 (1st Cir.), cert. denied, 449 U.S. 891 (1980).[5]

Additionally, the court of appeals correctly held that where, as here, a grand jury investigation is under way, the motion is "tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 132. The concerns about the potential for abuse and delay that animated the rule adopted in *DiBella* are squarely presented by a grand jury investigation. As the Court explained in *DiBella*: "Presentations before a * * *

---

[5] See also *Sealed Appellant 1*, 199 F.3d at 278 ("[T]he fact that Appellants are simultaneously seeking a suppression remedy under *Franks* strongly suggests that this motion is not intended solely or primarily for the mere return of property.").

grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train." *Id.* at 131 (citing *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)). And the Court has long recognized the danger of undue interference with and delay in the grand jury process. See, *e.g.*, *Cobbledick*, 309 U.S. at 327 ("It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstruct ing the 'orderly progress' of investigation should no more be encouraged in one case than in the other."); see also *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974) (rejecting suppression remedy before grand jury because, *inter alia*, it "would delay and disrupt grand jury proceedings," and thereby "'assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws'") (quoting *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)); *United States* v. *Regional Consulting Servs. for Econ. & Cmty. Dev., Inc*, 766 F.2d 870, 874 (4th Cir. 1985); *Church of Scientology* v. *United States*, 591 F.2d 533, 535-537 (9th Cir. 1979) ("The principle that runs through all of these authorities is that an ongoing criminal proceeding is not to be interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding."), cert. denied, 444 U.S. 1043 (1980).

2. As petitioner notes (Pet. 4-5), a conflict exists among the courts of appeals on the scope of the second *DiBella* factor—specifically, whether there is "a criminal prosecution *in esse*," *DiBella*, 369 U.S. at 132, when

a grand jury is investigating a movant, but charges have not yet been filed. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have held that it is.[6] The Sixth, Seventh, Eighth, and Tenth Circuits have adopted the contrary view.[7] That conflict, however, does not warrant review of this case.[8]

To begin, even if the issue otherwise warranted review, this case would not present a suitable vehicle for

---

[6] See, *e.g.*, *Imperial Distributors*, 617 F.2d at 896 (1st Cir.); *Standard Drywall*, 668 F.2d at 158 (2d Cir.); *United States* v. *Furina*, 707 F.2d 82, 84 (3d Cir. 1988); *Regional Consulting*, 766 F.2d at 874 (4th Cir.); *Sealed Appellant 1*, 199 F.3d at 278 (5th Cir.); *Church of Scientology*, 591 F.2d at 535-537 (9th Cir.); *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716, 717 (11th Cir. 1984) (per curiam).

[7] See, *e.g.*, *In re Warrant Dated Dec. 14, 1990 (Shapiro)*, 961 F.2d 1241, 1243 (6th Cir. 1992); *In re 949 Erie St., Racine, Wisc.*, 824 F.2d at 540-541 (7th Cir.); *In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 496 (8th Cir. 1983); *First Nat'l Bank of Tulsa* v. *United States Dep't of Justice*, 865 F.2d 217, 221 (10th Cir. 1989).

[8] Petitioner also cites (Pet. 5) the D.C. Circuit's decision in *United States* v. *Rayburn House Office Bldg*, 497 F.3d 654 (2007), but the court's jurisdiction there was not based on the conclusion that a final order had been entered in a separate Rule 41 proceeding, as petitioner argues was the case here. Rather, the court concluded that Representative Jefferson could appeal because "[l]etting the district court's decision stand until after the Congressman's trial would, if the Congressman is correct, allow the Executive to review privileged material in violation of the Speech or Debate Clause." *Id.* at 659. Accordingly, the court held that "jurisdiction of the Congressman's appeal rests on the collateral order doctrine." *Id.* at 658. That rationale presupposes that the Rule 41 motion *was* tied to a criminal proceeding *in esse*, but nonetheless involved an appealable order because of Speech or Debate considerations. Indeed, with respect to material that was not privileged under that Clause, the D.C. Circuit held that the Congressman's Rule 41(g) motion was "not independent of the criminal prosecution against him," and, applying *DeBella*, declined to exercise appellate review. *Id.* at 665-666.

resolving the conflict. As the district court and the magistrate judge concluded (*e.g.*, Pet. App. 7a-9a, 14a-15a, 20a), petitioner's motion is not "solely for the return of property," but is instead plainly "an effort to suppress evidence in related criminal proceedings." *Sealed Appellant 1*, 199 F.3d at 278 (internal quotation marks omitted). As a result, even if a grand jury investigation is not part of a "criminal prosecution *in esse*," petitioner would still fail to satisfy the requirements of *DiBella*. See, *e.g.*, *Furina*, 707 F.2d at 84 (order not appealable even if no criminal prosecution *in esse*, because "[s]uppression of evidence is the primary aim of their motions, and that is enough under *DiBella* to require that * * * the appeal be dismissed"); see also, *e.g.*, *In re Warrant Dated Dec. 14, 1990 (Shapiro)*, 961 F.2d at 1243-1245 (rejecting argument that pending investigation satisfies the "*in esse*" prong, but dismissing for lack of appellate jurisdiction because motion was not "solely for the return of property"); *In re 949 Erie St., Racine, Wisc.*, 824 F.2d at 540-541 (same).

In any event, the conflict in the circuits on this issue has existed since at least the 1970s, if not earlier. See, *e.g.*, *Standard Drywall*, 668 F.2d at 158 (citing cases from the 1960s, 1970s, and 1980s). This Court has repeatedly declined to review that conflict. See, *e.g.*, *Andersen* v. *United States*, No. 02-1045, Pet. at 7-11, cert. denied, 538 U.S. 977 (2003); *Standard Drywall*, *supra*; *Imperial Distributors*, *supra*; *Church of Scientology*, *supra*. Especially in light of the fact that resolution of the conflict would not affect the outcome in this case, there is no reason for a different result here.

3. Finally, petitioner contends (Pet. 8-9) that the decision below conflicts with the Ninth Circuit's own decision in *United States* v. *Comprehensive Drug Test-*

ing, Inc., 473 F.3d 915 (9th Cir. 2006), exercising jurisdiction over a government appeal of a pre-indictment order suppressing evidence under Rule 41(g). This Court, however, does not sit to resolve asserted intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, petitioner's claim was considered and specifically rejected below, Pet. App. 23a, and there is no conflict. The court in *Comprehensive Drug Testing* did not provide any analysis of *DiBella*, let alone any analysis that conflicts with *Andersen* or the order here. Moreover, an appeal by the government of an order *granting* pre-indictment suppression of evidence, as occurred in *Comprehensive Drug Testing*, 473 F.3d at 919-920, raises different jurisdictional issues than the *denial* of a defendant's motion for return of property, as happened here. An order requiring the return of all originals and copies and barring any use of the evidence by the government is likely to be immediately appealable under the collateral-order doctrine and under 18 U.S.C. 3731 (2000 & Supp. V 2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

NOVEMBER 2007